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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION

American Telephone and Telegraph Company (hereinafter AT&T) and United States Independent Telephone Association (hereinafter USITA) move pursuant to Rule 42 of this Court for leave to file a brief amici curiae in the above entitled proceeding. Petitioner has refused to consent to the filing of such brief.

INTEREST OF AMICI

AT&T and the Independent Telephone Companies represented by USITA have a very substantial financial stake in the outcome of this proceeding as evidenced by the amount of fees which they must pay pursuant to the fee schedule here at issue. For example, the fees paid by AT&T and the associated operating companies in the Bell System amounted to approximately $76,500 in 1969. In 1971, the first full fiscal year during which the present fee schedule was in effect, the amount of such fees

paid by the Bell System increased to approximately $4,200,000. Moreover, in a current rulemaking proceeding, 38 F.C.C.2d 587 (1972), the Federal Communications Commission proposes another boost of approximately 100% in those fees applicable to common carriers which would have the effect of increasing amounts paid by the telephone industry by millions of dollars annually.

The standing of the amici to assert these interests is clear. AT&T is the parent company of the Bell System. The principal business of AT&T and its subsidiaries which make up the Bell System is that of furnishing telecommunications services, mainly telephone service, throughout the United States, except Alaska and Hawaii. AT&T operates a network of cable, wire and radio circuits and related equipment to provide for interconnection among the communications systems of its telephone subsidiaries and other communications systems in the United States and for interconnection with those in most other countries throughout the world.

USITA is the trade association which represents the independent or non-Bell segment of the United States telephone industry. The Independent Telephone Companies provide communications services throughout slightly more than half the geographical service area of the United States, including Alaska and Hawaii. Through interconnection with the Bell System nationwide network the Independent Telephone Companies provide nationwide and worldwide communications services to their customers in the areas which they serve.

With respect to their interstate and foreign communications services, AT&T and the Independent Telephone Companies are regulated as common carriers by the Federal Communications Commission and like petitioner are subject to the Commission's rules relating to fees, 47 C.F.R. §§ 1.1101-1.1120, which are presently before this Court for review.

Although the challenge to the Commission's fees has been presented from the point of view of the CATV industry, the resolution of the issues involved requires an examination of the broader legal questions with respect to the extent of the Commission's authority to impose fees and the statutory criteria to which it must adhere in the setting of fees. The legal principles

involved are not limited to those rules which establish the fees applicable to the CATV industry but extend to the entire fee schedule including those fees applicable to AT&T and the Independent Telephone Companies.

AT&T and USITA believe that there are issues which they intend to present to this Court which will not be sufficiently addressed by petitioner who, it is anticipated, will concentrate on those issues which pertain to the special position of the CATV industry and in particular to the annual or subscriber fees imposed solely on the broadcast and CATV industries. Any decision which this Court may reach in the instant proceeding will of necessity have a significant impact on AT&T and the independent Telephone Companies in that the questions of law which will be resolved will affect the validity of the Commission's entire schedule of fees.

WHEREFORE, it is respectfully requested that AT&T and USITA be granted leave to file the annexed brief amici curiae in the above entitled proceeding.

Respectfully submitted,

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BRIEF AMICI CURIAE OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION

American Telephone and Telegraph Company (hereinafter AT&T) and United States Independent Telephone Association (hereinafter USITA) submit this brief as amici curiae in support of the position of petitioner herein. The interest of the amici has been stated in the motion accompanying this brief.

PRELIMINARY STATEMENT

This proceeding stems from the adoption by the Commission in 1970 of a new fee schedule which represented a radical departure from its previous practices in this area. The Commission's stated objective was to fix fees which would yield revenues approximating its total annual appropriation. The initial impact of the new schedule was to increase the amount of fees paid by the Bell System more than fifty-fold.

Prior to its action in 1970 the Commission had established its fees on the basis of a more limited objective. Its initial schedule, which had been adopted in 1963, fixed nominal fees for various applications made to the Commission. Report and Order, 34 F.C.C. 811. These fees produced revenues equal to approximately 25 percent of the Commission's annual appropriation. Although this schedule of fees was subsequently amended, the ratio of fee revenues to the annual appropriation remained approximately the same until 1970. See Report and Order, 23 F.C.C. 2d 880 at 881 (1970).

The validity of the Commission's first schedule of fees was upheld by the United States Court of Appeals for the Seventh Circuit which found that the Commission had not acted arbitrarily or in excess of its authority in establishing the nominal fees there in question. *Aeronautical Radio, Inc.* v. *United States*, 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965).

In 1970 the Commission issued a Notice of Proposed Rule Making, 21 F.C.C.2d 502, setting forth a new schedule of fees which for the first time was designed to produce revenues approximately equivalent to the Commission's total annual appropriation. In response to the Notice of Proposed Rule Making, *supra*, numerous parties, including amici herein, filed comments with the Commission which raised substantial questions as to the Commission's authority to impose fees of this nature.

In its Report and Order released July 2, 1970, 23 F.C.C.2d 880, the Commission disposed of the legal challenges to its authority and adopted the schedule of fees presently before this Court for review.* In so doing the Commission stated that its action was fully authorized by applicable statutes and executive guidelines and in accord with the views of Congressional committees which had urged it to adopt fees which would make it more fully self-sustaining. In order to achieve its goal of recovering its total annual appropriation through fee

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* Minor modifications in the fee schedule were made by the Commission in its Memorandum Opinion and Order, 28 F.C.C.2d 139 (1971).

revenues, the Commission increased fees already in existence, instituted new fees including grant fees to be paid in addition to filing fees upon the granting of applications, adopted a schedule of fees for the CATV industry and introduced annual fees for the CATV and broadcast industries.* The impact of the new fee schedule upon those subject to it was substantial. The fees paid by AT&T and other companies of the Bell System, for example, increased from approximately $76,500 in 1969 to approximately $4,200,000 in 1971, the first full fiscal year during which the new fee schedule was in effect. In fiscal year 1972 the fees paid by the Bell System amounted to $3,490,000.

The petitioner herein and other interested parties appealed the Commission's order adopting its new schedule of fees in the United States Court of Appeals for the Fifth Circuit. In *Clay Broadcasting Corp.* v. *United States*, 464 F.2d 1313 (5th Cir. 1972), the court upheld the validity of the fee schedule in all respects stating that the Commission had not exceeded or abused its statutory authority. This Court has now agreed to review that decision. AT&T and USITA as amici curiae urge that this Court reverse the decision below to the extent that it upholds the Commission's authority to impose fees to recoup the costs of Commission activities which are unrelated to the cost of rendering special services to identifiable recipients.

SUMMARY OF ARGUMENT

AT&T and USITA show in this brief amici curiae that in adopting the schedule of fees here in question the Commission has acted in excess of its authority. By examining the language and legislative history of the statutory provisions relied on by the Commission, the executive guidelines issued to implement those provisions, and the relevant case law, it is shown that Congress has not delegated to the Commission the authority to impose the fees here at issue which are designed to produce

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* Petitioner erroneously states at page 9 of its Petition for a Writ of Certiorari that an annual fee was imposed upon common carriers.

revenues equivalent to the Commission's entire annual appropriation and which are thus greatly in excess of the costs attributable to the performance of special services which benefit identifiable recipients.

ARGUMENT

IN ESTABLISHING THE SCHEDULE OF FEES HERE IN QUESTION, THE FEDERAL COMMUNICATIONS COMMISSION HAS EXCEEDED THE AUTHORITY DELEGATED TO IT BY CONGRESS

In its Report and Order of July 2, 1970, 23 F.C.C.2d 880, the Commission cites as legal authority for the adoption of the fee schedule here in question, Title V of the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 483(a) and Bureau of the Budget Circular A-25, the same authorities relied upon in the adoption of its prior fees. These authorities, however, do not support the Commission's position, nor can such support be found in the Commission's reference to statements of the Bureau of the Budget and Congressional committees which are said to have expressed the view that the Commission should adopt fees which would make it either fully self-sustaining or more nearly so. Although the Commission explains that the fee schedule which it has adopted ". . . has been prepared in the light of these executive and congressional directives . . ." (23 F.C.C. 2d at 881) its reliance on these "directives" is clearly misplaced. They do not have the force of law and cannot be relied upon as authority for the adoption of fees which are inconsistent with the controlling statutory language of Title V.

A. Title V of the Independent Offices Appropriations Act of 1952

Title V of the Independent Offices Appropriations Act of 1952, provides in pertinent part:

> "It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate,

> registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation . . . to prescribe therefor such fee, charge, or price, if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: . . ."*

The above language of Title V makes it amply clear that it is only the enumerated services and similar services for which fees may be set and which Congress directed to be self-sustaining to the full extent possible. The statute does not state that an agency which performs any of the enumerated services may impose fees which would make the agency's total operations self-sustaining to the full extent possible. Indeed if that had been the intent of Congress it would have expressly so stated.

The legislative background of Title V offers evidence that Congress did not intend to authorize the assessment of fees designed to enable agencies to recover the full cost of all their activities. The Report of the Senate Committee on Expenditures in the Executive Departments, S. Rep. No. 2120, 81st Cong., 2d Sess. (1950) issued a year before the passage of Title V, examined the advisability of establishing fees for governmental services rendered for special interests. The Report stated:

> ". . . The committee's approach, therefore, is not from a revenue-raising perspective, but is rather with the view of determining the feasibility of offsetting items now necessarily included in the Federal budget as non-reimbursable by transferring the financial burden thereof to the special beneficiaries. Thus, at the outset, it is desired to draw a clear line of distinction between serv-

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* The full text of Title V is reproduced at pages 3-4 of the Petition for a Writ of Certiorari in this proceeding.

> ices which the Federal Government renders, either upon request or by law, to special interests to which benefits thereby accrue at the expense of all the taxpayers, and services for which the Government is inherently liable and the benefits of which accrue to the people at large." (S. Rep. No. 2120, 81st Cong., 2d Sess. 1.)

In its conclusions the Committee emphasized this distinction between special services for which it recommended the imposition of fees and those services benefiting the general public for which no fees should be imposed by stating that in its staff reports the position has been maintained that:

> ". . . there is no thought here to establish a system of fees for fundamental Government services, but only to explore the feasibility and fairness of shifting to special beneficiaries the expense now being borne for them by the taxpayers at large." (S. Rep. No. 2120, 81st Cong., 2d Sess. 3.)

The Committee further stressed its intention to recommend fees for only those special services which benefit identifiable recipients by stating that where an identifiable recipient and the general public jointly benefit by the performance of a particular service, the cost of that service should be equitably divided between the beneficiary and the public and by taking the position that where there is doubt as to the degree or preponderance of the benefit no fee should be imposed. Thus the Report states:

> ". . . there is no doubt, however, that, of the 12 agencies included in this study, some render services the benefits of which accrue wholly to special interests which derive therefrom the means of financial success. The committee does incline to the view that, in such instances, the cost to which the Government is put should be borne by the beneficiaries. Where there is joint benefit to a particular beneficiary and to all of the people, the cost should be equitably divided, and where there is doubt as to the degree or preponderance of benefit, there should be no fee." (S. Rep. No. 2120, 81st Cong., 2d Sess. 3.)

Similarly the House Committee on Appropriations in its report accompanying the bill to which Title V was a rider stated

that "The Committee is concerned that the Government is not receiving full return for many of the services which it renders to special beneficiaries. . . ." (H.R. Rep. No. 384, 82d Cong., 1st Sess. 2 (1951).) By stating its concern in terms of the return obtained by the Government for services rendered for special beneficiaries, the Committee clearly indicated that in its view the purpose of Title V was to authorize the imposition of fees for such special services and not to transform the basic method of funding governmental agency operations by authorizing the imposition of fees designed to make an agency fully self-sustaining.

Thus the plain language of Title V as well as the legislative intent expressed by Congress in the reports cited demonstrate that that Title may not be relied upon as authority for the imposition of fees for services other than those which benefit identifiable recipients.

B. Bureau of the Budget Circular A-25

Bureau of the Budget Circular A-25 issued on September 23, 1959, pursuant to the provisions of Title V, sets forth guidelines for the implementation of that title.* In the Circular the Bureau of the Budget expressly recognizes the distinction between those services which an agency performs for an identifiable beneficiary and those which benefit the general public and provides that charges should be imposed only for the former category of services. Section 3a(1) of the Circular states:

> "Where a service (or privilege) provides special benefits to an identifiable recipient *above and beyond those which accrue to the public at large,* a charge should be imposed to recover the full cost to the Federal Government of rendering that service . . . ." (Emphasis added)

In order to describe the kinds of services for which fees may be imposed, the Circular lists certain examples which would be

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* The full text of the Circular is reproduced in Appendix C of the Petition for a Writ of Certiorari in the instant proceeding.

covered: receiving a patent, crop insurance, or a license to carry on a specific business (3a(1) (a)); certificates of necessity and convenience for airline routes, or safety inspections of craft (3a(1) (b)); or receiving a passport, visa, airman's certificate, or an inspection after regular duty hours (3a(1) (c)). All of the examples given are of particular services to identifiable recipients, and it is plain that the Bureau of the Budget contemplated fees which would recover no more than the cost of such services.

To provide additional guidance to the agencies implementing Title V, the Circular sets forth in Section 3a(2) the following criteria for identifying those services for which no charge should be made:

> "No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public . . . ."*

In order to establish that fees adopted pursuant to Title V must be directly related to the cost of providing a special service, Section 5b of the Circular states:

> ". . . The maximum fee for a special service will be governed by its total cost and not by the value of the service to the recipient. . . ."

Thus it is clear that although Title V provides that in setting fees an agency, in addition to considering the direct and indirect costs of providing the special service, should take into consideration the value conferred on the recipient and the public policy or interest served, that agency may not in reliance on the latter considerations adopt fees which produce revenues in excess of the costs of providing the service. The purport of Title V and the Circular is rather that if the cost of providing a special service is great and at the same time the value to the recipient

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*This provision of the Circular is in accord wth the position taken by the Senate Committee on Expenditures in the Executive Department in S. Rep. No. 2120, 81st Cong., 2d Sess. 3 (1950) quoted at page 9, *supra*.

is relatively small, the agency may in the interest of equity or public policy adopt fees lower than those required to recover the total cost of performing the service.

Because many of the Commission's services and activities do not confer special benefits upon those required to pay fees, the Commission's adoption of fees designed to recover the entire cost of administering the agency has of necessity violated the provisions of the Circular.

C. The Commission's Fee Schedule Improperly Imposes Fees Unrelated to the cost of Special Services Performed for the Benefit of Those Persons Required to Pay Such Fees

In its Supplemental Notice of March 4, 1970, 23 F.C.C.2d 183, the Commission described the process employed by it in arriving at its schedule of fees. That process involved identifying the direct and indirect costs of operating each of its bureaus and offices and thereafter distributing among them its remaining costs not directly attributable to any particular service. Fees were then developed for each service sufficient to produce revenues approximately covering the total costs thus allocated to the bureau or office performing that service.

As can be seen from the Supplemental Notice, *supra,* the Commission did not attempt to determine which of its services or activities redound to the benefit of identifiable recipients and which primarily benefit the general public. The sole object of the Commission was to develop fees which would generate revenues equivalent to the total cost of administering the agency. The setting of fees in this manner is clearly beyond the authority granted by Title V and is contrary to the guidelines of Bureau of the Budget Circular A-25.

It cannot be disputed that many of the services and activities of the Commission are performed for the benefit of the general public rather than for the benefit of special interests. Such activities include various rulemaking and investigatory proceedings, spectrum management studies, activities relating to emergency communications, participation in international confer-

ences, participation in joint industry and government advisory committees, activities of the Common Carrier Bureau trial staff in representing the public interest in common carrier rate proceedings as well as disposing of numerous complaint and other adjudicatory proceedings all of which benefit the public as a whole. To the extent that the Commission fees are designed to reimburse the Government for costs arising from the provision of such services which are performed for the benefit of the public at large, their adoption is beyond the authority delegated to the Commission by Congress.*

In yet another respect the fees set by the Commission are based on costs which are unrelated to the provision of services of benefit to identifiable recipients. Under the fee schedule such communications services as local government, police, fire and other emergency radio services (see Subpart G, Part I of Chapter I, 47 C.F.R. § 1.1115(c) for list of exemptions) as well as numerous complaint and other adjudicatory proceedings are exempt from the payment of fees. Under the Commission's fee setting approach the cost of providing services for these exempt classes is borne by those who are not exempt and who thus are required to pay fees which exceed the cost of providing the services of which they themselves are the beneficiaries. If pursuant to the provisions of the Circular fees may not be imposed for services when the ultimate beneficiary is obscure, *a fortiori* fees may not be imposed for special services rendered for the benefit of readily identifiable recipients other than those who are obliged to pay the fees. Likewise the provisions of the Circular are violated in that the maximum fees to be paid by the non-

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* Because it was not the intention of Congress to authorize the imposition of full recovery fees, there are no statutory guidelines to assure that the fee burden is rationally and equitably distributed among those regulated by the Commission. Thus under the fee schedule here in question the grant fee paid in 1973 by AT&T for its Long Lines Department's "blanket" construction application amounted to $2,100,882 or more than 25% of the costs allocated to the Common Carrier Bureau for fiscal year 1974. No rational justification appears for imposing a fee of this magnitude for the grant of one application.

exempt classes are not governed by the cost of providing those particular services which benefit them rather than other identifiable interests.

Thus in determining that the costs for special services which are exempt from fees must be met by fees paid by those receiving other services which are not exempt, the Commission has exceeded its statutory authority. Neither Title V nor the Circular authorizes the imposition of such fees. Although the Commission may within its discretion determine that it is in the public interest for certain classes of applicants to be either exempt from the payment of fees or permitted to pay fees which are not sufficient to meet the costs of providing services to them, the costs incurred in the provision of such services should not be met by fees collected from those who are not exempt.

By setting fees which are great enough to cover services performed for the general public or for classes of applicants exempted from the payment of fees, the Commission has crossed the boundary between the assessment of fees and the assessment of taxes. It is evident from the language of both Title V and the Circular which ties the fees authorized to something of "value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person . . ." that Congress and the Bureau of the Budget were giving recognition to the fundamental legal distinction between a fee and a tax. A "fee" must bear a reasonable relationship to the extent and nature of services rendered or benefits conferred which are in excess of those that accrue to the public generally. *Hanson* v. *Griffiths*, 124 N.Y.S.2d 473, 476, 204 Misc. 736 (Sup. Ct. Westchester Co. 1953), *aff'd*, 127 N.Y.S.2d 819, 283 App. Div. 662 (2nd Dep't. 1959); *Smith* v. *Carbon County*, 90 Utah 560, 63 P.2d 259, 262, 108 A.L.R. 513 (Sup. Ct. 1936). The test of the reasonableness of a license fee is that it shall be no greater than is sufficient to cover the expenses of administration. *Meyers* v. *Matthews*, 270 Wis. 453, 71 N.W.2d 368 (Sup. Ct. 1955), *appeal dismissed*, 350 U.S. 927, *rehearing denied*, 350 U.S. 977 (1956). See also *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202, 210-11 (1944). Thus to the extent that the

Commission's fee schedule is designed to produce revenues in excess of the cost of rendering the special services, benefits and other things of utility to particular recipients, they constitute a tax to be used to fund those activities of the Commission designed to benefit those recipients of special services who are exempt from the payment of fees and those activities of the Commission designed to benefit the general public. Congress has not delegated to the Commission the authority to impose such a tax.

D. Court Decisions Interpreting Title V of the Independent Offices Appropriations Act and Bureau of the Budget Circular A-25 Do Not Support the Decision of the Court Below

The court decisions which have interpreted the provisions of Title V and the Circular fail to support the holding of the court below. Both the Commission and the court below rely upon *Aeronautical Radio, Inc.* v. *United States*, 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965) in support of the proposition that fee revenues need not be limited by the cost of administering particular services. The *Aeronautical* case does not, however, stand for this proposition. In that case the court upheld the Federal Communications Commission's authority to impose nominal fees for the granting of certain licenses. The validity of fees amounting to the Commission's entire annual appropriation and greatly in excess of the cost of issuing those licenses was not in question. — *Aeronautical* stated that it was within the Commission's discretion to balance the statutory criteria for setting fees, *e.g.*, cost of administration, value to the recipient and public interest served, and to allocate to each the weight which it sees fit. However, the court did not state that in balancing these criteria the Commission could ignore the statutory limitations of Title V and the guidelines of the Circular.

The decision of the court below reflects a fundamental misapplication of the law which requires the rejection of its hold-

ing. That court held that the general regulatory activities of the Commission which do not confer a special benefit, service or thing of utility on a specific recipient are the sorts of activity for which fees may lawfully be imposed.

> ". . . The Commission regulation of the broadcast industry generally provides individual licensees with continuing protection from technical interference as is consistent with the public interest and maintains the market structure which makes it possible for commercial broadcasting to operate at a profit. We therefore are unable to find that the Commission acted unreasonably or arbitrarily in imposing on commercial licensees an annual fee which is part of a schedule calculated to fully recover the direct and indirect costs of regulating the broadcast industry." (464 F.2d 1313 at 1318)

Even the most casual reading of Title V and the Circular indicates that it is just this sort of general function for which the identification of the ultimate beneficiary is obscure and for which fees are not authorized.

Having misconstrued the nature of the fees authorized by Title V, the court summarily disposed of the provisions of the Circular by stating:

> ". . . Bureau of the Budget Circular A-25 which provides 'The maximum fee for a special service will be governed by its total cost and not by the value of the service to the recipient' does not compel the Commission to precisely pro-rate its costs in performing the various services in the Broadcast Bureau and limit the fee for each service to its precise administrative cost. Indeed such precision would be difficult if not altogether impossible to achieve." (464 F.2d 1313 at 1317-18)

As can be seen this does not meet the question of whether the Commission may lawfully impose fees which are intended to yield revenues in excess of the total cost of performing the special services for which fees may be imposed. The court went on to state, in effect, that the explicit cost limitation provi-

sions of the Circular may be disregarded and that the value to the recipient alone may be relied upon in setting fees. Although the language of the Circular is unambiguous, the court offered no rationale or justification for choosing not to abide by its clear mandate.

Subsequent to the decision of the court below the United States Court of Appeals for the District of Columbia rendered its decision in *New England Power Co.* v. *Federal Power Commission*, 467 F.2d 425 (D.C. Cir. 1972). On May 14, 1973, this Court agreed to review that case, 41 U.S.L.W. 3605. In *New England Power Co., supra,* the court struck down the annual fees imposed on the natural gas pipeline and electric industries by the Federal Power Commission. These fees were to make the administration of Parts II and III of the Federal Power Act self-sustaining by assessing those costs not met by filing fees against jurisdictional companies in accordance with a formula. As statutory authority for the imposition of its fees, the Federal Power Commission like the Federal Communications Commission relied on Title V.

In the *New England Power Co.* case, the court engaged in a careful analysis of Title V and the Circular in arriving at its decision to strike down the Power Commission's annual fees. The court held that the maintenance of an "economic climate" (closely akin to the "market structure" mentioned by the court below) is not a "special service" for which the law permits the imposition of a fee.

> ". . . The creation of an 'economic climate' is not a special service nor is a particular pipeline or gas company the 'special beneficiary' of such a climate any more than any other pipeline, gas company or the consumer in general. Indeed, under the Commission's order petitioners would be liable for the annual assessment despite the fact that they had no proceedings before the Commission for that year. . . ." (467 F.2d 425 at 429)

The court stated that the contemplated charges are unrelated to specific services or benefits rendered and that the maintenance of an "economic climate" is an:

> ". . . overly broad benefit particularly in light of the requirement that the charges be for a 'measurable unit of service.' Furthermore, the statutory language—'to or for any person'—as well as the Budget Circular require an identifiable recipient. . . ." (467 F.2d 425 at 429)

The court concluded that those activities of the Commission which benefit the general public should be supported from the general fund of the treasury and that Congress had not authorized the levying of fees for such activities.

> "In sum, we conclude that the regulation of these industries is primarily for the benefit of the public. Their charter statutes require them so to act. The courts have so held. There is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public. In the absence of a clear Congressional mandate to the contrary, *we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury. We are well aware of the burgeoning administrative expense of operating the Government, however, only Congress can give authority to levy these fees. It has not done so here.*" (467 F.2d 425 at 429) (Emphasis added.)

The conflict between the holding of the court below and that of the court in the *New England Power Co.* case is evident. AT&T and USITA as amici curiae believe that the decision of the court in *New England Power Co.* is fully supported by the language of Title V, its legislative history and by the language of the Circular and further believe that the court below in failing to analyze Title V and its executive guidelines arrived at a decision which is not legally supportable. It is therefore urged that this court resolve the conflict in the circuits by concurring in the reasoning of the court in the *New England Power Co.* case.

CONCLUSION

For all of the foregoing reasons it is respectfully requested that this Court reverse the decision of the court below to the extent that it upheld the validity of Commission fees which are unrelated to the cost of providing special services to identifiable beneficiaries and thus not authorized by Title V of the Independent Offices Appropriations Act and Bureau of the Budget Circular A-25.

Respectfully submitted,

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